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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-952

RANDAL RUSH, et al.,

Appellants,

vs.

JEFFREY D. SAVCHUK,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

APPELLEE'S BRIEF

EDWARD H. BORKON
485 Pillsbury Building
608 Second Avenue South
Minneapolis, Minnesota 55402
(612) 333-7155
Attorney for Appellee

OF COUNSEL:
Schermer, Schwappach, Borkon &
Ramstead, Ltd.
Minneapolis, Minnesota

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ARGUMENT

I.

BACKGROUND: Seider v. Roth

The procedure followed by the plaintiff herein to obtain *in rem* jurisdiction over the defendant by garnishing the obligation owed to the defendant by his insurance company received initial court approval by the New York Court of Appeals in *Seider v. Roth*, 17 N.Y.2d 111, 215 N.E.2d 312, 287 N.Y.S.2d 99 (1966). In *Seider* as in the instant case, the plaintiffs were residents of the forum state and were in-

jured in an out-of-state automobile accident caused by the negligence of an out-of-state defendant. The plaintiff in each case obtained *in rem* jurisdiction over the defendant by either attaching or garnishing the contractual obligation of defendant's insurance carrier to defend and indemnify the defendant. The insurance carrier, in each case, while not a corporation of the forum state, did have offices and did conduct business within the forum and was subject to regulation by that state. Based on those facts, the Court of Appeals in *Seider* found that the insurer's contractual obligation constituted a debt within the meaning of the applicable statute and could therefore be attached. Jurisdiction was then property acquired by this attachment.

The following year the New York Court of Appeals was asked to reconsider its decision in *Seider* based upon federal constitutional grounds. In *Simpson v. Lohmann,* 21 N.Y.2d 305, 234 N.E.2d 669, 287 N.Y.S.2d 633 (1975), the New York Court again upheld the constitutionality of the attachment procedure. In so doing that Court correctly recognized that the traditional distinctions between *in rem* and *in personam* jurisdiction were disappearing and that the rigid tests previously used to determine jurisdictional issues were being replaced by a "more realistic and reasonable evaluation of the respective rights of plaintiffs, defendants and the State in terms of fairness." 234 N.E.2d at 672. That court then examined the situation in terms of the standard of fairness established in *International Shoe v. Washington,* 326 U.S.310 (1945). The New York Court recognized that application of such a standard required

> a practical appraisal of the situation of the various parties rather than an emphasis upon somewhat mag-

> ical and midieval concepts of presence and power. Viewed realistically, the insurer in a case such as the present is in full control of the litigation; it selects the defendant's attorneys; it decides if and when to settle; and it makes all procedural decisions in connection with the litigation (citations omitted). Moreover, where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the state has a substantial and continuing relation with the controversy. For jurisdictional purposes, in assessing fairness under the due process clause and in determining the public policy of New York, such factors loom large. *Id.*

Following *Simpson,* other federal and state courts have also upheld the constitutionality of the *Seider* procedure. *Minichiello v. Rosenberg,* 410 F.2d 106 (2d Cir. 1968), cert. den. 393 U.S. 844, reh. den. 396 U.S. 949 (1969); *Rintalla v. Shoemaker,* 362 F. Supp. 1044 (D. Minn. 1973); *Jeans v. Mitchell,* 418 F. Supp. 730 (D. Minn. 1976); *Forbes v. Boynton,* 313 A.2d 129 (N.H. 1973). In each case the court chose to examine the realities of the situation, the fact of the plaintiff's residence within the forum state, the active and controlling role played by the insurance company and the nature of the res attached, that being the obligation to defend. Thus, even before being compelled to do so by *Shaffer,* courts have examined the *Seider* attachment procedure with regard to the standard of *International Shoe* and have not found it to be lacking.

The instant case was the first opportunity the Minnesota Supreme Court had to address the constitutionality of the *Seider* procedure. In its initial opinion that Court upheld Minn. Stat. §571.41, Subd. 2 against constitutional attack

on the grounds that (1) defendant received proper notice, adequate to defend his property; (2) defendant's exposure was limited to the policy limits of his insurance contract and (3) plaintiff was a resident of the state at the time the action was commenced (A-37). This last requirement was expressly imposed

> since without this connection the state would lack sufficient meaningful contacts with the suit to justify the exercise of jurisdiction (A-37, note 6).

Thus, the Minnesota Court was already well aware of the need to apply a standard of fairness in determining this constitutional question.

II.

In Rem Jurisdiction: Impact of Shaffer v. Heitner

Following the Minnesota Supreme Court's decision in *Savchuk* I, there ensued an appeal to this Court (A-48). This court vacated and remanded the matter to the Minnesota Supreme Court for further consideration in light of a decision handed down after the Minnesota Court had initially decided the case. Appellants now argue that the Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 902 (1977) invalidated the *Seider* type attachment which forms the basis for *in rem* jurisdiction used in *Savchuk*. For those reasons, it is appropriate to ascertain what role *Shaffer* has and whether or not it promulgates new principles which require a rejection of the limited jurisdiction procured under *Seider* type attachments.

The decision in *Shaffer* was but one case in a long progression of decisions from this Court which have attempted

to deal with the elusive concepts of jurisdiction. As was recognized therein, this progression really began with the century old case of *Pennoyer v. Neff*, 95 U.S. 714 (1977) which established "the basic elements of the constitutional doctrine governing state court jurisdiction." 433 U.S. at 213. In *Pennoyer*, this Court formulated a theory of jurisdiction founded upon the concept of physical presence within the territorial confines of a state. At that time two distinct classifications emerged, that classified as jurisdiction in *personam*, which was founded upon an individual's physical presence within a state and jurisdiction *in rem*, that founded upon the actual presence of property within a state. An action could proceed *in rem* even though the owner of the property was not within the state or subject to personal jurisdiction, because the action was considered to be directly against the property and the owner was regarded as being only incidentally affected by the litigation.

These tenuous distinctions ultimately led to the establishment of two separate lines of authority in which concepts of *in rem* jurisdiction developed and matured differently from those *in personam*. The progression on the side of *in personam* jurisdiction was a gradual change from recognizing only physical presence as a basis of jurisdiction to the utilization of other indicia. The impetus for this move was a recognition of the realities of such things as interstate travel, and interstate corporate activities. See *Hess v. Pawloski*, 274 U.S. 352 (1927); *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); *Philadelphia and R.R. Co. v. McKibbin*, 243 U.S. 264 (1917); *Milliken v. Meyer*, 311 U.S. 457 (1940). Accompanying this progression was a change in the considerations a court was re-

quired to examine in determining whether jurisdiction was proper. These considerations were finally enunciated in the landmark case of *International Shoe v. Washington,* 326 U.S. 310, 316 (1945) wherein Mr. Chief Justice Stone writing for the Court stated:

> "But now that the *capias ad Respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Milliken v. Meyer,* 311 U.S. 457, 463.

This Court did not and has not required that these contacts be the best possible contacts, but rather contacts of such a nature which "make it reasonable in the context of our federal system of government to require the corporation to defend the particular suit which is brought here." *Id.* Thus, the inquiry for purposes of *in personam* jurisdiction became one into the relationship between the defendant, the forum and the litigation. *Shaffer,* 433 U.S. at 204.

As this Court recognized in *Shaffer, Id.,* development of the *in rem* side of the jurisdiction question did not keep pace. Judicial inquiry remained limited to a determination of the present location of the res. There were no counterveiling considerations similar to those outlined in *International Shoe* which needed to be examined. If property could be located within a state, that was sufficient to give that state jurisdiction.

There were, however, problems with such an approach. The concept of presence as a basis for jurisdiction was

workable when applied to tangible items, such as real property because there generally was a sufficient nexus with the state to make it reasonable for an owner to expect suit there. The concept worked less well when applied to highly mobile items or intangible pieces of property, for with such items it was likely that suit could be brought in a state where the owner could hardly envision himself being subjected to suit and where the state had an interest only because it was the present situs of the property.

It was those latter problems which this Court sought to address and correct in *Shaffer* and it is there that *Shaffer* has its true impact. First came the recognition that *in rem* jurisdiction is in reality "jurisdiction over the interests of persons in things." 433 U.S. at 209. This then led naturally to the imposition of the due process requirement of the minimum contacts standard of fairness as a prerequisite to the extension of *in rem* jurisdiction. *Id.*

Thus, the true impact of *Shaffer* is not in the abolition of *in rem* jurisdiction, for that concept remains a useful and necessary one. Rather, it is in the requirement that there be more than the mere presence of a res in order to justify state court extension of jurisdiction. Presence alone is insufficient, there must instead be a relationship between the forum, the parties, the property and the litigation.

To acquire this result it was necessary to overrule some cases which had been established precedent for many years. It is one of appellant's contentions that this action sounded the death knell for *Seider* type cases because the sole constitutional basis for *Seider* was provided by these overruled cases. An examination of what this Court actually did in this regard demonstrates the fallacy of that argument.

The key language appears to be located in Part III of

the majority opinion wherein Mr. Justice Marshall writing for the Court states:

> "We therefore conclude that all assertions of state court jurisdictions must be evaluated according to the standards set forth in International Shoe and its progeny."[39]
>
> 39 It would not be fruitful for us to reexamine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled. 433 U.S. at 212.

Thus, the fact that some of the cases supporting *Seider* type jurisdiction cited *Harris* does not per se render those cases invalid, for not every case citing either *Harris* or *Pennoyer* is necessarily overruled by *Shaffer*. It is only when *Harris* is used to support an extension of *in rem* jurisdiction inconsistent with the principles of *International Shoe* that such case must now fall.

The *Harris* case is an important one and an understanding of why it was overruled is vital. The facts in *Harris* are complicated, and as they are more than adequately summarized in *Shaffer* it would serve no purpose to reiterate them here. *Harris* was overturned not because of its premise than an intangible price of property, such as a debt, travels with the debtor, or because it permitted an intangible piece of property to be attached and utilized as a means of securing jurisdiction. Those concepts remain valid and untouched by the decision in *Shaffer*. It is in those areas that the courts sustaining the *in rem* jurisdiction achieved

by a *Seider* attachment have looked to *Harris* for authority and in those areas *Harris* remains good law.

The part of *Harris* which was overruled had to do with its support of in rem jurisdiction based solely upon the presence of property within a state, which property was unrelated to the plaintiff's cause of action and which applied no standard of fairness or justice. This was precisely the same infirmity which caused the Supreme Court to invalidate the Delaware procedure utilized in *Shaffer* as this Court therein made clear.

> "The Delaware Courts based their assertion of jurisdiction in this case solely on the statutory presence of appellants property in Delaware. Yet that property is not the subject matter of this litigation nor is the underlying cause of action related to the property." 433 U.S. at 209.

The Court in *Shaffer* was careful to explain that this holding was not intended to affect *in rem* jurisdiction which did not suffer from those maladies and which otherwise satisfied the *International Shoe* standard of substantial justice and fairness.

This is not, however, to be interpreted as meaning that the location of property is unimportant in determining the propriety of an extension of state court in rem jurisdiction. This Court in *Shaffer* expressly realized that presence of property within a state may have a bearing on the existence of jurisdiction by providing important contacts between the forum and the litigants. It is only when the property forms the only contact with the forum state that under *Shaffer* it is insufficient to give that state jurisdiction. The *Seider* procedure does not rest solely upon the location of a res

within a state and thus does not become invalid because of *Shaffer* or the overruling of *Harris*.

III.

Distinguishing *Savchuk* from *Shaffer*

The decision in *Shaffer* does not invalidate the *Seider* attachment procedure which is the basis for in rem jurisdiction herein because the exercise of *in rem* jurisdiction by the State of Minnesota is factually distinguishable from that exercised by the State of Delaware overturned in *Shaffer*. Whenever a comparison of cases is made factual distinctions are apparent. However, in this instance these distinctions are substantial and go to the very heart of the constitutional question, for the problems this Court noted with jurisdiction based on the attachment in *Shaffer* are absent in *Savchuk*.

One fundamental difference is apparent at once when the interests of the two forum states is compared. In *Shaffer*, Delaware had little reason to be concerned with the outcome of the litigation for that state was neither the state of residence of either the plaintiff or the defendant, nor was it the situs of the tort which gave rise to plaintiff's cause of action. Delaware was selected because it was on paper the location of the property attached. In reality the res was even located outside of the state.

This should be contrasted with the actual contacts the State of Minnesota has in the instant case which give to it an active interest and concern lacking to Delaware in *Shaffer*. While Minnesota is not the site of the automobile accident underlying this lawsuit, it is the bona fide residence of the plaintiff and has been since the commencement of

the litigation. It is Minnesota which must protect and care for the plaintiff in the event of indigency, and it is its state services which the plaintiff uses. This fact of residence gives Minnesota a legitimate interest in providing a forum in which plaintiff may litigate their claims, as well as an active interest in the outcome of the case. This Court has even recognized the validity of a state's interest in protecting its own residents, albeit in another context. *Alaska Packers Ass'n. v. Industrial Accident Comm'n*, 294 U.S. 532 (1939). Thus Minnesota possesses an interest which far exceeds any interest asserted on behalf of the State of Delaware.

Furthermore, while as in *Shaffer* the named defendant is also a non-resident, there is here present another entity possessing significant contacts with the state, namely, the insurance company. Besides being the mere possessor of the res, the insurer is also the real party in interest in this kind of case. As has been recognized by other courts, it is the insurer who does the investigation, hires and pays for the attorneys, who makes all the strategy decisions and who ultimately provides the source of payment. The named defendant has little genuine interest beyond that of providing notification of the fact of the accident and in cooperating with the insurer. Here the insurance company, while not a Minnesota corporation, does conduct substantial business in that state through offices located within the state. The company is licensed by the state and is subject to continuing regulation by the state. These are, in fact, the very kinds of contacts which would render the insurance company itself amenable to *in personam* jurisdiction within the state. *International Shoe v. Washington*, supra. These contacts also give Minnesota additional reasons justifying the

extension of jurisdiction herein. There is nothing comparable in *Shaffer*.

Another major area of differences between the two cases is in the nature of the property seized. In Shaffer the res was stock certificates, items possessing an independent value and purpose for existence apart from the litigation. Also, as the Court properly recognized that property had nothing to do with corporate fiduciary capacity and thus was completely unrelated to the plaintiff's cause of action. However, in the instant case, the property garnished was a debt, an obligation between the defendant and his insurance company whereby the insurer assumes the responsibility to defend and if necessary indemnify. This obligation was created precisely for the purpose of protecting the defendant from a lawsuit such as was brought by plaintiff. As correctly recognized by the Minnesota Supreme Court in *Savchuk II*

> The insurer's obligation to defend and indemnify, while theoretically separable from the tort action, has *no* independent value or significance apart from accident litigation. In accident litigation, however, it is inevitably the focus, determining the rights and obligations of the insurer, the insured and practically speaking, the victim. (A-59)

In addition, it is this res which forms the entire source from which the plaintiff's claims are ultimately satisfied. Unlike *Shaffer*, the liability of defendant is confined to the value of the res and defendant need not fear personal liability in excess thereof.

The last major difference between the two cases is in the nature of the procedure itself. By statute the attachment procedure in *Shaffer* mandated a personal appearance by defendant. He thereby subjected himself to in personam jurisdiction and liability in excess of the value of the property attached for there was nothing in the Delaware procedure which operated to limit his liability. Thus, the attachment was in reality only an indirect method of achieving personal jurisdiction over a defendant, which this Court in *Shaffer* found impermissible.

The prejudgment garnishment procedure of Minnesota Statute 571.41, Subd. 2 is also a means of securing jurisdiction, but here there are present procedural safeguards unavailable to the defendant in *Shaffer*. Here, by decision of the Minnesota Supreme Court, liability is limited to the value of the res, or the policy limits (A-37 and A-60). Therefore, the defendant is not subjected to personal liability in excess thereof and the problem of *Shaffer* is avoided.

IV.

Establishing Minimum Contacts

The Supreme Court in *Shaffer* did not promulgate any new principles necessarily requiring a rejection of the limited jurisdictional procedure of *Seider* type attachments as was used in the present case. What the Court did in *Shaffer* was to require that ". . . all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progency." *Shaffer*, supra at 212.

This requirement in reality imposes no new duty of inquiry for, as was discussed above, the courts sustaining jurisdiction so acquired have already examined the pro-

cedure in those terms and not found it to be lacking. Courts following the decision in *Shaffer* have also reexamined the issue and arrived at the same conclusion. *O'Connor v. Lee Hy Paving Corp.*, 379 F.2d 194 (2d Cir. 1978), cert. den. — U.S. —, reh. den. — U.S. — (1979).

The Minnesota Supreme Court has twice examined this question and both times has concluded there is no due process violation by utilization of the *Seider* procedure. In its initial opinion, among the requirements the Court imposed upon was that the procedure be available only to plaintiffs who are residents of the state at the time the action is commenced. (A-37). The Court felt this was necessary to ensure that there were sufficient meaningful contacts with the state to justify the exercise of jurisdiction. (A. 35 note 6.) On remand the Minnesota Supreme Court again examined the relationship between the forum, the parties, the property and the litigation. They felt that Minnesota did possess the requisite kind of contacts.

Nothing in *Shaffer* commands a different result. The standard of *International Shoe* rests upon the relationship between the parties, the forum and the litigation. As indicated by the foregoing discussion, the plaintiff herein is a state resident who has invoked the strong public policy of this state of providing protection for its residents. It is clear that the real party in interest, i.e. the "defendant" to whom the jurisdictional and constitutional analysis should apply, is the insurer, who is also present, doing business within the state. Furthermore, not only is the property which was the subject of the attachment at the heart of plaintiff's cause of action, but the very purpose for its existence is to provide a defense and source of recovery in this kind of action.

Acceptance of the *Seider* type procedure does not necessarily mean that it must be utilized in every conceivable situation. Potential abuses, such as those cited in Appellant's Brief (pages 16 and 17) could be prevented by legislative or judicial limitation. There is also available change of venue procedures and the doctrine of *forum non-conveniens* if a court is persuaded that prejudice to a particular defendant or his increased burdens outweigh the plaintiff's interest in a home forum.

It again must be emphasized that the Supreme Court has never required the "best" contacts, but only "minimum" contacts. In view of those considerations, it cannot be said that there do not exist sufficient contacts with the state that an extension of state court jurisdiction would offend "traditional notions of fair play and substantial justice." The *Seider* attachment procedure thus does comply with the standard of fairness enunciated in *Shaffer* and should be upheld.

CONCLUSION

On the basis of the arguments advanced and the authorities cited herein, it is respectfully submitted that the decision of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

EDWARD H. BORKON
485 Pillsbury Building
608 Second Avenue South
Minneapolis, Minnesota 55402
(612) 333-7155
Attorney for Appellee

OF COUNSEL:
Schermer, Schwappach,
Borkon & Ramstead, Ltd.
Minneapolis, Minnesota